No. 73-1210

In the

Supreme Court of the United States

October Term, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF AMICUS CURIAE of Western Railroad Traffic Association

June 10, 1974

JAMES H. CLARKE
800 Pacific Building
520 SW Yamhill Street
Portland, Oregon 97204
Counsel for Western Railroad Traffic Association, *amicus curiae*

INDEX

TABLE OF AUTHORITIES

CASES

UNITED STATES STATUTE

OTHER AUTHORITIES

In the Supreme Court of the United States

October Term, 1973

No. 73-1210

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON-PACIFIC INDUSTRIES, INC., ARTHUR A. POZZI CO., TIMBERLAND LUMBER CO., CHAPMAN LUMBER CO., NORTH PACIFIC LUMBER CO., and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

INTEREST OF AMICUS CURIAE

Western railroads which are members of Western Railroad Traffic Association are primarily responsible for moving wood products from western mills to eastern markets, traffic which requires a sufficient supply of boxcars and other freight cars suitable for shipping lumber and plywood.1/ In October 1972 high do-

---

1/ See *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742 at 750 discussing recurring car shortages affecting the wood products industry.

mestic demand and grain shipments to the U.S.S.R. combined to create a critical shortage of cars suitable for transporting grain and lumber, and the shortage grew progressively worse during 1973. By May, the average daily shortage of plain boxcars, which are used for both grain and wood products and are the "work horse of the car fleet," exceeded 13,000 cars (Comm Letter 5/14/73; Byrne aff). Much of the burden of the shortage fell upon members of Western Railroad Traffic Association.

The shortage was aggravated by inefficient car utilization practices employed by shippers.[2/] Among these practices is one referred to by the District Court as "sales-in-transit" marketing. Under this system, brokers who sell approximately 75% of all lumber and plywood produced in the nation (Cheatham affidavit) commonly ship loaded cars from western mills to reconsignment points prior to sale and without a destination. There the cars are held until completed sales — hopefully made in a rising market — permit the shippers to notify the carriers of their destinations. Under published tariffs, shippers receive the benefit of through rates to those points.

The practical effect of in-transit sales is to immobilize large numbers of cars by using them as ware-

2/ See *Atchison, Topeka & Santa Fe Railway v. Witchita Trade Board,* (1973) 412 US 800, 803 n. 2, 829 n. 1, 836.

houses, and the practice has been harshly criticized.[3/] The extent of this non-transportation use of cars is shown by appellees' evidence that they house 55,000 carloads of lumber in boxcars each year, and their contention that the economic effect of the order is to make them provide storage for an additional 2.5 million board feet of wood products (Cheatham affidavit).

Car Service Order 1134 was issued in May 1973 under Section 1(15) of the Interstate Commerce Act (49 USC Sec 1(15)) to afford relief from such practices during the emergency which had developed, by limiting hold time at reconsignment points to five days. After that period, through rates to final destinations would no longer apply and charges would be calculated by combining local rates. The order succeeded in its purpose. While it was in effect, shippers ceased to hold cars at reconsignment points for excessive periods. (Byrne affidavit)

The District Court's decree setting the order aside has had a substantial and adverse impact on the supply of cars available to the western lines. This, however, is not its entire significance. It nullified an important decision of the Commission which had been taken in the public interest to alleviate an emergency car shortage. In doing so, it gave no weight to the

3/ *Turner, Dennis & Lowry Lumber Co. v. Chicago M & S T P RR Co.*, (1926) 271 US 259 at 262.

Commission's duty under Section 1(15) "*** to act promptly on the spur of the moment in case of emergency,"[4/] and required it instead to follow procedures which have been criticized for involving "too many hearings and . . . too little action."[5/]

This Court should not merely analyze and sustain the order; it should support the Commission's determination to meet emergencies promptly and vigorously by effective temporary measures such as this, which supplement decisions under other provisions of the law that require a longer time to have their intended effect of improving the national car supply.

SUMMARY OF ARGUMENT

I

Car service orders, including emergency orders under Section 1(15), commonly affect published tariffs, regulate shippers and increase charges for transportation service. *Iverson v. United States,* (D DC 1946) 63 F Supp 1001, aff (1946) 327 US 767; *Armour & Co. v. Louisiana Southern Ry Co.,* (5th Cir 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913. They are not limited to orders which fix demurrage charges or which regulate carriers as opposed to shippers. *Reading*

4/ See House Report 456, 66th Congress, 1st Sess at 17, quoted in *Peoria Ry. Co. v. United States,* (1923) 263 US 528 at 533, n. 7.

5/ See *United States v. Florida East Coast Railway Co.,* (1973) 410 US 224 at 232.

Co. v. Commodity Credit Corp., (3d Cir 1961) 289 F2d 744; *Armour & Co. v. Louisiana Southern Ry Co.*, (5th Cir 1951) 190 F2d 925, cert den (1952) 342 US 913. Their character as car service orders is established by their purpose to regulate the use and supply of cars. Section 1(10); *Peoria & Pekin Union Railway Co. v. United States*, (1923) 263 US 528. Their validity is not affected by any incidental effect on published tariffs, shippers, or charges for transportation services. Like all emergency orders, this one is controlled by the nature and duration of the emergency which called it forth, which provides sufficient protection against abuse of the Commission's authority under Section 1(15). *United States v. Thompson*, (ED Mo 1944) 58 F Supp 213.

II

Car Service Order 1134 is purely regulatory; its success is not measured by revenues it generates for carriers, but by its effect on shippers' use of cars. In substance, it does no more than limit hold time at reconsignment points. References in the order to local rates do not change it into a compensatory rate order, but merely explain the economic effect of limiting hold time. *Reading Co. v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744 at 748. The order supplements the Commission's long range efforts to eliminate car shortages through incentive *per diem* and other measures,

by providing temporary relief in an emergency. *United States v. Florida East Coast Railway Co.*, (1973) 410 US 224.

III

Circumstances arising from time to time can elevate the chronic shortage of cars in the national car pool into an emergency requiring immediate action in the national interest, and unwarranted limitations on the Commission's authority under Section 1(15) will cause hardship to shippers and carriers, and to the public. By requiring the Commission to employ lengthy hearing procedures before meeting the emergency in the way its judgment dictates, the District Court ignored the legislative history of the Esch Car Service Act and forced the Commission to adopt a course which has been harshly criticized and is inconsistent with the purpose of emergency measures.

The District Court's narrow definition of car service orders will apply equally to orders entered after limited hearing procedures under Section 1(14) and to emergency orders entered without hearing under Section 1(15). The unfortunate result of its decision is to require proceedings under Section 15 of the Act, which characterize changes of compensatory rates, before action deemed responsive to an emergency car shortage can be taken. However, it is not at all clear that such an

order is authorized under Section 15, and the Commission's authority to deal effectively with an emergency car shortage contributed to by sales-in-transit may exist only under Section 1(15).

ARGUMENT

I.

Car Service Order 1134 is a valid emergency regulation issued under Section 1(15) of the Interstate Commerce Act to improve car utilization.

The District Court attempted to distinguish between "car service orders" and "rate orders," holding that an emergency car service order to improve the use of cars by shippers cannot affect the application of published tariffs. Section 1(10) of the Act contains no such conceptual limitation on orders to control the use of cars, and none have been implied by the courts, which have refused to restrict the remedies available to the Commission to alleviate emergency car shortages.

1. *Car service orders can affect the application of published tariffs.*

Car Service Order 1134 is one of several orders which have been required from time to time during emergency car shortages to regulate shippers' use of cars by suspending published tariffs and increasing transpor-

tation charges. Thus, orders increasing demurrage charges paid by shippers and suspending published demurrage tariffs have been uniformly sustained.[6/] Such orders commonly establish car retention periods beyond which charges become burdensome, and they operate like this one, through temporary economic incentives to regulate the use of cars by shippers.

In *Iverson v. United States*, (D DC 1946) 63 F Supp 1001 at 1006, aff (1946) 327 US 767 the court held that orders suspending published tariffs which determine transportation charges are authorized by Section 1(15).[7/] Such orders are sustained because they "clearly provide an effective means of relieving a shortage of railroad freight cars." *Armour & Company v. St. Paul Railroad Company*, (5th Cir 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913.

In *Reading Co. v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744 the court sustained Car Service Order 905, which provided economic incentives to improve car utilization by limiting free time to seven days. Un-

6/ E.g., Car Service Order 180 (October 2, 1944) sustained in *Iverson vs United States*, (D DC 1946) 63 F Supp 1001, aff (1946) 327 US 767; Car Service Order 775 (April 26, 1948) sustained in *Chicago, M. St. P. & P. R. Co. v. McCree & Co.*, (DC Minn 1950) 91 F Supp 57 and *Armour & Co. v. Louisiana Southern Ry. Co.*, (5th Cir 1951) 190 F2d 925, cert den (1952) 342 US 913; Car Service Order 905 (July 13, 1955) sustained in *Reading Company v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744.

7/ ". . . If a published rule or regulation affects or determines a charge, it is nevertheless a rule or regulation." *Id* at 1006.

like the present order, it did not contain any explanation of its effect on charges after that period. The court refused to limit emergency orders under Section 1(15) to those applying to demurrage charges and sustained the order as a proper and effective regulation of car use by affecting the application of published tariffs.[8/]

Such orders affecting published tariffs are designed to provide economic incentives to increase car utilization in an emergency. Their character as car service orders is established by their purpose, and is not changed by reason of the particular published tariff which may be involved. Such incentive regulation is an essential alternative to direct regulation, and it should be sustained as a reasonable measure which preserves to shippers continuing control over transportation charges which they will pay during periods of emergency.

2. *Car service orders can regulate shippers.*

The District Court's conclusion that Section 1(10)

8/ The court stated:

> ". . . Another cause [of car shortages] is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. If Order 905 were held to apply only to demurrage charges it would not have the effect of expediting the release of cars utilized by shippers for storage purposes. Thus, the Order would less efficiently accomplish its purpose of alleviating the critical shortage of box cars and refrigerator cars." 289 F2d at 748.

of the Act limits car service orders to rules affecting carriers, not shippers, is not required by its terms and has been rejected by the courts which have considered it. *Reading Co. v. Commodity Service Corp.*, (3d Cir 1961) 289 F2d 744 at 750 (order reducing free time from 20 to 7 days is legitimate regulation which forces shippers to reduce detention time at destination and at reconsignment points); *Armour & Co. v. Louisiana Southern Railway*, (5th Cir 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913.

Clearly, the need for increased car utilization during periods of shortage requires authority to regulate shippers as to relevant matters which shippers control, principally the time required to return the car to the carrier for other transportation service. The retention of cars by shippers for non-transportation purposes burdens the national pool no less than delays by carriers in returning cars to originating lines. See *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742. The regulation of car use under the Esch Car Service Act must extend equally to both.

3. ***Car Service Order 1134 is a conventional regulation of car service.***

The District Court was concerned that Car Service Order 1134 constitutes an unprecedented use of the Commission's emergency power to deny shippers an es-

tablished business practice. However, the order is not an innovation. It is substantially identical in material respects to Service Order 858, which was promulgated in 1950 to alleviate an emergency car shortage affecting the lumber industry during the Korean War. It is also identical in its economic effect to demurrage and other orders referred to above, which control shippers' use of cars through economic incentives without the complete ban on given practices which is suggested by the District Court. In substance and effect, it is not different from orders which have preceded it and are an established part of the Commission's jurisdiction.

Peoria & Pekin Union Railway Co. v. United States, (1923) 263 US 528 does not support a narrow construction of Section 1(10) or suggest that car service orders cannot affect charges for transportation services or the application of published tariffs. In the *Peoria* case, the Court broadly defined "car service" as connoting "the use to which the vehicles of transportation are put; not the transportation service rendered by means of them." 263 US at 533.9/

9/ In *United States v. Michigan Portland Cement Co.*, (1925) 270 US 521 the Court limited *Peoria* to a restriction on the Commission's power to impose an "affirmative duty on another carrier" to perform switching services, and approved orders under Section 1(15) regulating "preference or priority" in transportation:

> ". . . It was in this connection that this court used the expression that car service connotes the use to which vehicles of transportation are put, but not the transportation

Car Service Order 1134 is a conventional and valid order for the regulation of car use, and it is authorized under 1(15) of the Act regardless of its incidental effect on published tariffs, its regulatory impact on shippers, and its indirect effect on transportation charges.

4. *Emergency car service orders are controlled by the duration and the nature of the emergency.*

Orders issued without hearing under Section 1(15) of the Act are by their nature limited in duration and narrow in scope; it is their temporary and limited nature and the conditions to which they respond which justify issuing them without following the limited procedural requirements of Section 1(14). See *United States v. Florida East Coast Railway Co.*, (1973) 410 US 224.

In this case, the record demonstrates the existence of a critical shortage of cars used to ship plywood and lumber and the need for immediate relief. Indeed, the District Court did not question the Commission's opinion that an emergency existed. Nor is there any doubt that the order was carefully tailored to the specific shortage which prevailed when it was issued. It affected only cars commonly used for shipping lumber

---

service rendered by means of them. The opinion expressly affirms the authority of the Commission under ¶15 [sec 1 (15)] to give regulatory directions for preference or priority in transportation." 270 US at 527.

and plywood and was issued in the first instance for only six weeks. It could be extended only upon a rational determination that the emergency had not ceased and that such regulation was still necessary. *United States v. Thompson,* (ED Mo 1944) 58 F Supp 213.

Emergency orders do not pose a threat to established rate-making procedures or deprive shippers of any right they may have under published tariffs to use cars as warehouses. Because they are responsive to an emergency, the specific remedy adopted by the Commission will be limited[10/] as well as temporary. However, the fact that there is an emergency requires that the range of action available to the Commission be broadly conceived. The Commission has — and needs — wide discretion in selecting appropriate remedies to deal with such cases. It also follows that emergency orders are subject to only limited judicial review. *Daugherty Lumber Co. v. United States,* (D Or 1956) 141 F Supp 576. The controlling consideration is the congressional desire that the Commission should act promptly "on the spur of the moment in case of an emergency." *Peoria Ry. Co. v. United States,* (1923) 263 US 528 at 533, n. 7.

10/ See *United States v. Southern Ry. Co.,* (4th Cir 1967) 380 F2d 49:

> "The contours of a 'direction' issued in response to a specific emergency situation are necessarily shaped by the character of emergency." 380 F2d at 55-56, n. 7.

The Commission should be encouraged to follow that mandate, and the Court should not circumscribe action it can take in such cases. The Commission's power is broad, but it is sufficiently limited by the statute, which "confines the power of the Commission to emergencies and the requirement that the rule shall be reasonable in the interests of the public and of commerce fixes the only standard that is practical or needed." *Avent v. United States*, (1924) 266 US 127 at 130.

II

Car Service Order 1134 is not a rate order subject to Section 15 of the Act.

References in the order to the application of local rather than through rates after five days were unnecessary to its regulatory operation and had no visible purpose except to explain the result of limiting hold time to that period and to notify shippers of charges which should be considered in making their selling decisions at reconsignment points. The impact of the order is the same, with or without those references, and they cannot affect its character as a rule whose purpose is to regulate car use and increase car supply.

The purely regulatory purpose of the order is clear from its text, which describes the emergency that called it forth and its objective. Clearly, it would achieve

its purpose only if it did not generate revenue for carriers, and it would fail if it did so. The order is designed to discourage in-transit sales, not to compensate carriers for the use of their cars, and it is not its "only result * * * to cause payments to be made to the railroad by shippers." *Iverson v. United States*, (D DC 1946) 63 F Supp 1001, aff (1946) 327 US 767. Indeed, it was almost completely successful in eliminating excessive detention of cars prior to the decree of the District Court.

The effect of the order on the application of published tariffs does not deny shippers all freedom of choice as to rates they will pay for transportation services. An order like this one, which limits hold time, achieves its regulatory purpose without imposing on shippers an inflexible rule which arbitrarily bans in-transit sales or establishes flat increases in demurrage charges. This was a flexible and effective response to a critical situation, which did not become a rate order simply because it was reasonable. *Reading Co. v. Commodity Credit Corp.*, (3d Cir 1961) 289 F2d 744.

Emergency regulations such as Car Service Order 1134 are important supplements to the Commission's long-range program of action, including orders under Section 1(14), to alleviate the chronic shortage of cars in the national pool. *Investigation of the Adequacy*

of Freight Car Ownership, (1969) 335 ICC 264; *United States v. Allegheny-Ludlum Steel Corp.,* (1972) 406 US 742 at 746. Orders under Section 1(14), such as the one sustained in *Allegheny-Ludlum,* require time to achieve their purpose, and this Court recognized in that case that "the railroad and shippers were inflicted with an economic illness that might have to get worse before it gets better." 406 US at 754. See also *United States v. Florida East Coast Railway Co.,* (1973) 410 US 224. The Commission must depend heavily at this time on its emergency authority to meet temporary situations which may arise and threaten to turn a chronic shortage into a disaster for carriers, shippers and the public. The Commission's authority to handle these cases must extend to this kind of temporary incentive regulation of shipper practices which so decisively affect car supply.

III

The District Court's decision requires the Commission to proceed under Section 15 of the Interstate Commerce Act, which is a severe and unreasonable limitation of its authority to remedy emergency car shortages.

1. *Section 1(15) authorizes the Commission to regulate car use without a hearing to alleviate emergency car shortages.*

An underlying question in this case is whether an order regulating car use to alleviate an emergency car shortage can be issued without a hearing when it affects the application of published tariffs for transportation services, which in other instances would require proceedings, including hearings, under Section 15 of the Act. The effect of the District Court's decision is that it cannot, although the Act places no such limitation on orders under Section 1(15) and the courts have refused to do so.

When the Esch Car Service Act was before Congress, the report of the House Committee on Interstate and Foreign Commerce, HR Rep No 18, 65th Cong, 1st Sess at 7 (1917) emphasized the need for summary procedures and broad options to deal with emergency car shortages:

> "It may be objected that this [see 1(15)] authorizes a summary proceeding, but similar language may be found in section 15 of the interstate commerce act relating to the investigation of new schedules. The authority to make *just and reasonable direction with respect to car service during the emergency as in the opinion of the commission will best meet the emergency* and promote operation of car service in the interest of the public and the advantage of convenience and commerce of the people presents in general terms the main object for the enactment of the pending bill, and if through its enactment the operation of car service in the inter-

ests of the public and to the advantage of convenience and commerce of the people is secured its enactment is wise." (Emphasis added)

Present conditions in the industry do not suggest that the Commission's authority to respond promptly in such cases without a hearing has become less necessary. Indeed, this Court has recently held that the hearing required before issuing car service orders under Section 1(14) of the Act need not be adjudicatory in nature. *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742. See also *United States v. Florida East Coast Railway Co.*, (1973) 410 US 224, in which the Court took note of criticism of the Commission for "conducting too many hearings and taking too little action." 410 US at 232.

It is clear from the statute and from the decided cases that car service orders do not depend upon oral testimony and cross-examination, and that hearing procedures designed to determine "reasonable compensation for use" are unnecessary in proceedings for such orders. A corresponding liberality should be extended to orders under Section 1(15), which are the only summary proceedings authorized by the Act

to deal with emergency situations. The right to a hearing in rate proceedings under Section 15 should not inhibit or limit the scope of emergency orders under Section 1(15).

The District Court's view that Car Service Order 1134 can only be issued after hearings because it affects transportation charges unreasonably restricts the Commission's authority to deal with emergency car shortages and is not consistent with the Congressional purpose or with the views of this Court.

2. ***It is uncertain if a regulation limiting hold time is authorized by Section 15.***

As shown above, Car Service Order 1134 is a regulatory limitation on hold time which is limited in scope and duration. Consequently, there was no need to engage in lengthy proceedings under Section 15, which would be appropriate if it was an order to establish compensation to reimburse railroads for loss of use of cars held at reconsignment points.

We should add that it is not clear that a regulatory order of this kind, which does not contemplate increased revenue for carriers and would fail if there were any, is authorized by Section 15. This Court has recognized that in applying the National Transportation Policy (49 USC preceding Section 1) orders under Section 15 can

be shaped by regulatory considerations,[11/] including considerations of car supply.

However, it is difficult to find in the language of Section 15 authority to engage in regulation, as such, for purposes other than to determine reasonable compensation and to prevent or remedy unjust or discriminatory charges, and a purely regulatory order whose only purpose is to control the use of cars does not appear to be contemplated by Section 15. See *Palmer v. United States,* (D DC 1947) 75 F Supp 63 at 68. Certainly, orders such as this are commonly issued as car service orders under Section 1(14) or 1(15).

If the Commission cannot deal with in-transit sales effectively under Section 15 or through car service orders under its emergency power when circumstances require such action, it follows that it has little authority to deal with the matter at all. However, the practice of in-transit sales is a substantial factor contributing to car shortages, and the Court should not invite such a result.

11/ In *Atchison, T. & S. F. R. Co. v. Bd. of Trade,* (1973) 412 US 800 the Court considered increases in accessorial charges for in-transit grain inspections that were designed primarily to eliminate wasteful shipping practices in the grain industry. The Court recognized that the order was the result of car shortages which followed the Russian grain transaction, and three Justices described it as a "promising effort to solve a critical problem." 412 US at 836.

CONCLUSION

Car Service Order 1134 was a valid order under Section 1(15) of the Act, and the decree of the District Court should be reversed.

Respectfully submitted,

JAMES H. CLARKE,
Counsel for Western Railroad
Traffic Association, *amicus curiae.*

June 10, 1974

OGLESBY H. YOUNG
MARK S. DODSON
of Counsel